A

Samsudin bin Md Suppian lwn Pendakwa Raya

B MAHKAMAH RAYUAN (PUTRAJAYA) — RAYUAN JENAYAH NO B-09–101–03 TAHUN 2022
HADHARIAH SYED ISMAIL, AZMAN ABDULLAH AND AZMI ARIFFIN HHMR
16 DISEMBER 2024

C

Prosedur Jenayah — Rayuan — Rayuan terhadap sabitan dan hukuman — Perayu mengaku salah bagi kesalahan sumbang mahram — Perayu dijatuhkan hukuman penjara 18 tahun oleh hakim bicara — Rayuan perayu terhadap hukuman ditolak oleh Mahkamah Tinggi — Mahkamah Tinggi membenarkan rayuan silang pendakwa raya terhadap hukuman dan menaikkan tempoh pemenjaraan kepada 20 tahun — Perayu memfailkan rayuan terhadap sabitan dan hukuman di Mahkamah Rayuan — Sama ada sabitan adalah tidak selamat dan harus diketepikan — Sama ada Mahkamah Rayuan boleh mempertimbangkan lagi rayuan terhadap sabitan setelah perayu dengan rela hati memilih untuk mengaku salah terhadap pertuduhan — Sama ada hakim bicara telah memastikan bahawa pengakuan salah dibuat tanpa bersyarat — Sama ada perayu mengetahui sifat dan akibat pengakuan salah — Sama ada hukuman pemenjaraan adalah terlalu tinggi — Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ss 16(1), 26(1) & 27(1) — Kanun Keseksaan ss 376(3) & 376B — Kanun Tatacara Jenayah ss 173(b), 305 & 323(1)

D

E

F

Perayu telah dituduh di bawah s 376B Kanun Keseksaan ('KK') yang boleh dihukum di bawah s 376(3) KK dibaca bersama s 16(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ('Akta 792') bagi kesalahan sumbang mahram yang dilakukan ke atas cucunya yang berusia tujuh tahun. Perayu telah mengaku salah dan kemudiannya disabitkan di atas pertuduhan tersebut. Puan Hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak ('hakim bicara') yang bijaksana kemudiannya menjatuhkan hukuman pemenjaraan selama 18 tahun bermula dari tarikh tangkap terhadap perayu. Seterusnya perayu diperintahkan untuk menjalani kaunseling pemulihan selama sepuluh tahun mengikut peruntukan s 26(1) Akta 792. Selain itu, perayu juga diperintahkan untuk menjalani pengawasan polis selama tiga tahun setelah selesai menjalani hukuman pemenjaraan menurut s 27(1) Akta 792. Di peringkat rayuan di Mahkamah Tinggi, rayuan perayu terhadap hukuman telah ditolak tetapi rayuan silang pendakwa raya dibenarkan di mana tempoh hukuman pemenjaraan telah dinaikkan kepada 20 tahun. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan di Mahkamah Rayuan terhadap sabitan dan hukuman. Isu pertama yang harus diputuskan oleh mahkamah adalah sama ada sabitan adalah tidak selamat dan

G

H

I

harus diketepikan. Berkenaan dengan isu ini, persoalan-persoalan yang berbangkit adalah: (a) sama ada mahkamah di peringkat rayuan boleh mempertimbangkan lagi rayuan terhadap sabitan setelah perayu dengan rela hati memilih untuk mengaku salah terhadap pertuduhan tersebut; dan (b) sama ada hakim bicara sebelum merekodkan pengakuan salah dan sabitan terhadap perayu dan hukuman dijatuhkan telah memastikan bahawa pengakuan salah tersebut dibuat tanpa bersyarat dan perayu mengetahui sifat dan akibat pengakuan salahnya itu. Isu kedua yang berbangkit adalah sama ada hukuman pemenjaraan adalah terlalu tinggi.

Diputuskan, menolak rayuan perayu terhadap sabitan dan hukuman, dan mengekalkan lain-lain perintah tambahan yang diberikan oleh Mahkamah Tinggi:

(1) Berdasarkan kepada nas undang-undang yang dirujuk oleh mahkamah, adalah jelas bahawa walaupun s 305 Kanun Tatacara Jenayah ('KTJ') menyekat rayuan terhadap sabitan dibuat setelah pengakuan salah dirakamkan, namun mahkamah semasa di peringkat rayuan masih boleh mempertimbangkan rayuan terhadap sabitan tersebut jika mahkamah mendapati sabitan yang direkodkan tersebut adalah tidak sah atau menyalahi undang-undang dan sebagainya. Di dalam situasi demikian, mahkamah dibenarkan, jika bersesuaian, melaksanakan kuasa penyemakan yang diberikan di bawah s 323 (1) KTJ 'for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court' untuk mengenepikan sabitan dan hukuman tersebut jika terdapat alasan yang kukuh untuk mahkamah bertindak sedemikian (lihat perenggan 28).

(2) Sebelum merekodkan pengakuan salah dan sabitan terhadap perayu dan menjatuhkan hukuman, s 173(b) KTJ menghendaki hakim bicara untuk memastikan bahawa pengakuan salah tersebut dibuat tanpa bersyarat dan perayu mengetahui sifat dan akibat pengakuan salahnya itu. Berdasarkan nota prosiding, adalah jelas bahawa hakim bicara telah mematuhi kesemua kehendak peruntukan di bawah s 173(b) KTJ dengan sempurna. Selain itu, kesemua keterangan dokumentari yang dikemukakan dan ditandakan di mahkamah sebagai eksh P1–P7 juga turut dibacakan kepada perayu dan ada juga ekshibit yang diterangkan kepada perayu bagi memudahkan beliau memahaminya. Kesemua ekshibit tersebut kemudiannya diakui benar oleh perayu. Perayu juga telah mengemukakan mitigasinya sebelum mahkamah menjatuhkan hukuman. Persuruhjaya kehakiman yang bijaksana di peringkat rayuan juga turut mengesahkan dan mengekalkan sabitan tersebut. Sebagai rumusan, mahkamah mendapati tiada apa-apa ketidakpatuhan atau pelanggaran prosedur yang berlaku sehingga memprejudiskan perayu atau mendatangkan apa-apa ketidakadilan undang-undang (*miscarriage*

of justice) kepada beliau sepanjang prosiding berjalan. Oleh yang demikian, sabitan adalah selamat (lihat perenggan 29 & 31–33).

(3) Kes-kes yang melibatkan jenayah seksual adalah suatu kesalahan yang keji dan mengaibkan lebih-lebih lagi di dalam kes semasa di mana mangsa yang pada ketika itu berusia tujuh tahun telah dirogol oleh datuknya sendiri yang berusia 68 tahun. Perayu yang diamanahkan untuk menjaga cucunya telah mengambil kesempatan memuaskan nafsunya semasa ibu bapa mangsa tiada di rumah. Amanah yang diletakkan di atas bahu perayu untuk menjaga mangsa telah dikhianati oleh perayu. Justeru itu, hukuman berat wajar dikenakan terhadap perayu sebagai pengajaran kepada beliau dan amaran kepada masyarakat umum supaya jangan sesekali terlibat di dalam jenayah sebegini di masa-masa hadapan. Walaupun perayu telah membuat pengakuan salah yang telah menjimatkan masa dan kos semua pihak, namun, kepentingan individu tidak harus mengatasi kepentingan awam (lihat perenggan 40–41 & 44).

[English summary

The appellant was charged under s 376B of the Penal Code ('the PC') punishable under s 376(3) of the PC read with s 16(1) of the Sexual Offences Against Children Act 2017 ('Act 792') for the offence of incest committed on his seven-year-old granddaughter. The appellant pleaded guilty and was subsequently convicted on the charge. The learned judge of the Sexual Offences Against Children Court ('the trial judge') then sentenced the appellant to imprisonment for a term of 18 years commencing from the date of his arrest. The appellant was subsequently ordered to undergo rehabilitation counselling for ten years in accordance with the provisions of s 26(1) of Act 792. In addition, the appellant was also ordered to undergo police supervision for three years after completing his imprisonment sentence in accordance with s 27(1) of Act 792. At the appeal stage in the High Court, the appellant's appeal against the sentence was dismissed but the public prosecutor's cross-appeal was allowed where the period of imprisonment was increased to 20 years. Aggrieved by the decision, the appellant filed an appeal in the Court of Appeal against the conviction and sentence. The first issue for the court to decide was whether the conviction was unsafe and should be set aside. In relation to this issue, the questions that arose were: (a) whether the court at the appeal stage may further consider the appeal against the conviction after the appellant voluntarily chose to plead guilty to the charge; and (b) whether the trial judge, before recording the guilty plea and conviction of the appellant and imposing the sentence, ensured that the guilty plea was made unconditionally and that the appellant was aware of the nature and consequences of his guilty plea. The second issue that arose was whether the sentence of imprisonment was excessive.

Held, dismissing the appellant's appeal against conviction and sentence, and upholding other additional orders granted by the High Court:

(1) Based on the authorities referred to by the court, it was clear that although s 305 of the Criminal Procedure Code ('the CPC') barred an appeal against a conviction made after a guilty plea had been recorded, the court at the appeal stage may still consider an appeal against the conviction if the court found that the recorded conviction was invalid or illegal, etc. In such a situation, the court was permitted, if appropriate, to exercise the power of review conferred under s 323(1) of the CPC 'for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court' to set aside the conviction and sentence if there were good reasons for the court to do so (see para 28).

(2) Before recording the guilty plea and conviction of the appellant and imposing sentence, s 173(b) of the CPC required the trial judge to ensure that the guilty plea was made unconditionally and that the appellant was aware of the nature and consequences of his guilty plea. Based on the notes of the proceedings, it was clear that the trial judge had appropriately complied with all the requirements of the provisions under s 173(b) of the CPC. In addition, all the documentary evidence produced and marked in court as exhs P1–P7 were also read out to the appellant and some exhibits were also explained to the appellant to facilitate his understanding. All the exhibits were subsequently admitted to be true by the appellant. The appellant also submitted his mitigation before the court imposed the sentence. The learned judicial commissioner at the appeal stage also affirmed and upheld the conviction. In conclusion, the court found that there was no non-compliance or breach of procedure that prejudiced the appellant or caused any miscarriage of justice to him throughout the proceedings. Therefore, the conviction was safe (see paras 29 & 31–33).

(3) Cases involving sexual crimes were heinous and humiliating offences, especially in the present case where the victim, who was seven years old at the time, was raped by her own grandfather, who was 68 years old. The appellant, who was entrusted with the care of his granddaughter, took advantage of the opportunity to satisfy his lust while the victim's parents were not at home. The trust placed on the appellant's shoulders to care for the victim was betrayed by the appellant. Therefore, a severe sentence should be imposed on the appellant as a lesson to him and a warning to the general public not to ever get involved in such crimes in the future. Although the appellant had made a guilty plea which had saved time and costs for all parties, individual interests should not override public interests (see paras 40–41 & 44).]

Kes-kes yang dirujuk

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83; [1981] 1 LNS 139, MP (dirujuk)
Hajar bt Ishak v PP [2000] MLJU 367; [2000] 4 CLJ 46, MT (dirujuk)
Kesavan a/l Baskaran v PP [2008] 6 MLJ 384, MR (dirujuk)
Mohammad bin Hassan v PP [1998] 5 MLJ 65; [1997] 1 CLJ Supp 485, MT (dirujuk)
Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 1 MLJ 645, MR (dirujuk)
Norshaharin v PP [2001] MLJU 631; [2002] 5 CLJ 492, MT (dirujuk)
Ong Lai Kim v PP and other appeals [1991] 3 MLJ 111, MT (dirujuk)
Pendakwa Raya lwn Ramakrishnan a/l Subramaniam dan lain-lain [2013] 2 MLJ 549; [2012] 9 CLJ 443, MR (dirujuk)
Pendakwa Raya v Prabu a/l Veeramuthu and Others [2010] MLJU 663; [2010] 8 CLJ 257; [2010] 1 LNS 695, MR (dirujuk)
PP v Paghutheen [1969] 1 MLJ 25 (dirujuk)
PP v William Ayau [2005] 4 MLJ 328, MT (dirujuk)
Tuan Mat bin Tuan Lonik v PP [2009] 4 MLJ 81; [2009] 4 CLJ 638, MR (dirujuk)
Wong Siak Fon v PP [1972] 1 MLJ 203 (dirujuk)

Undang-undang yang dirujuk

Akta Kesalahan Seksual Terhadap Kanak-Kanak 2017 ss 16, 26(1), 27(1)
Akta Mahkamah Kehakiman 1964 ss 56, 60
Kanun Keseksaan ss 376(3), 376B
Kanun Tatacara Jenayah ss 173(b), 305, 323(1)

Rayuan daripada: *Samsudin bin Md Suppian lwn Pendakwa Raya* [2022] MLJU 780 (Mahkamah Tinggi, Shah Alam) dan Perbicaraan Jenayah No FA-62JSK-319–08 Tahun 2021 (Mahkamah Jenayah Seksual Terhadap Kanak-Kanak di dalam Putrajaya, Wilayah Persekutuan)

Muhamad Afiq Audy (Nurliny Che Soh bersamanya) (Nurliny & Co) bagi pihak perayu.
Sarulatha a/p Paramavathar (Timbalan Pendakwa Raya, Jabatan Peguam Negara) bagi pihak responden.

Azmi Ariffin HMR:

KRONOLOGI PERISTIWA

[1] Pada 5 Ogos 2021, Perayu telah dituduh di Mahkamah Jenayah Seksual Terhadap Kanak-Kanak di Putrajaya di atas pertuduhan berikut:

Bahawa kamu pada 01/04/2018 jam lebih kurang 6.30 petang beralamat di Rumah

E-1-26 Blok E Jalan BM 4/5 Persiaran Mahkota Seksyen 4, Bandar Bukit Mahkota 43000 Kajang, di dalam Daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, sebagai seorang yang mempunyai hubungan amanah iaitu datuk kandung, telah merogol seorang kanak-kanak perempuan bernama xxxx (No Mykid: xxx) yang berumur 7 tahun 7 bulan sewaktu kejadian yang mana oleh kerana perhubungan kamu dengannya adalah tidak dibenarkan di bawah undang-undang hukum agama yang terpakai kepada kamu untuk berkahwin. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 376B Kanun Keseksaan dan boleh dihukum dibawah seksyen 376(3) Kanun Keseksaan dan dibaca bersama seksyen 16(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017.

[2] Pada 16 Ogos 2021, perayu telah mengaku salah, memahami sifat dan akibat pengakuan salahnya. Fakta kes yang dibacakan turut diakui benar oleh perayu.

[3] Puan hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak yang bijaksana telah mensabitkan perayu di atas pertuduhan tersebut dan menjatuhkan hukuman seperti berikut:

(a) hukuman pemenjaraan selama 18 tahun bermula dari tarikh tangkap (5 Ogos 2021);

(b) perayu diperintahkan untuk menjalani kaunseling pemulihan selama sepuluh tahun mengikut peruntukan s 26(1) Akta Kesalahan Seksual Terhadap Kanak Kanak 2017; dan

(c) perayu diperintahkan untuk menjalani pengawasan polis selama tiga tahun setelah selesai menjalani hukuman pemenjaraan menurut s 27(1) Akta Kesalahan Seksual Terhadap Kanak-Kanak 2017.

[4] Tidak berpuashati dengan keputusan tersebut, pada 17 Ogos 2021 perayu telah memfailkan notis rayuan ke Mahkamah Tinggi Shah Alam terhadap *hukuman sahaja*. Pihak pendakwa raya juga turut memfailkan rayuan silang atas hukuman.

[5] Perayu kemudiannya telah melantik Tetuan Rafaei & Co sebagai peguambelanya. Pada 26 Ogos 2021 peguambela perayu telah memfailkan notis rayuan *ke Mahkamah Tinggi Shah Alam terhadap sabitan dan hukuman*.

[6] Pada 2 Mac 2022, Pesurujaya Kehakiman Mahkamah Tinggi Shah Alam yang bijaksana telah menolak rayuan perayu dan mengekalkan sabitan yang djatuhkan oleh Puan hakim Jenayah Seksual Terhadap Kanak-Kanak yang bijkasana. Namun begitu, hukuman pemenjaraan selama 18 tahun telah dinaikkan kepada 20 tahun pemenjaraan setelah Mahkamah Tinggi membenarkan rayuan silang pendakwa raya.

[7] Terkilan dengan keputusan tersebut, pada 14 Mac 2022, perayu telah memfailkan satu notis rayuan ke *Mahkamah Rayuan terhadap sabitan dan hukuman*. Namun setakat 19 Oktober 2023 petisyen rayuan masih belum difailkan.

[8] Petisyen perayu bertarikh 2 November 2021 telah difailkan oleh peguambela perayu.

[9] Selanjutnya, melalui lampiran 19 bertarikh 28 Disember 2023, satu notis usul telah difailkan oleh perayu bagi mendapatkan perintah kebenaran memfailkan petisyen rayuan di luar tempoh masa di Mahkamah Rayuan di bawah s 56 Akta Mahkamah Kehakiman 1964.

[10] Pada 21 Februari 2024, Mahkamah Rayuan telah membenarkan lampiran 19 tersebut dengan perintah seperti berikut:

(i) pemohon/perayu dibenarkan untuk mendapatkan kebenaran Mahkamah Rayuan yang mulia ini untuk memfailkan notis usul ini; dan

(ii) pemohon/perayu dibenarkan untuk melanjutkan masa bagi memfailkan petisyen rayuan di dalam masa sepuluh hari selepas mendapat perintah ini.

[11] Pada 27 Februari 2024 peguambela baru yang dilantik (Tetuan Nurliny & Co) oleh perayu telah memfailkan satu lagi petisyen rayuan yang baru (kandungan 33) ke Mahkamah Rayuan.

FAKTA KES SECARA RINGKAS

[12] Pada April 2018 lebih kurang jam 6.30 petang semasa berada di alamat E-1–26 Jalan BM 4/5 Off Persiaraan Mahkota Seksyen 4, Bandar Bukit Mahkota 43000 Kajang Selangor ketika mangsa/pengadu (berumur tujuh tahun tujuh bulan) selesai mandi dengan berkemban kain tuala dan masuk ke bilik hendak memakai baju, tiba-tiba perayu telah masuk ke bilik dan telah menyuruh mangsa baring di atas katil. Perayu membuka kain pelikatnya. Kemudian perayu telah memasukkan kemaluannya ke dalam kemaluan mangsa. Mangsa terasa basah seperti air keluar di kemaluannya. Kemudian perayu bangun dan telah meninggalkan mangsa. Kejadian seperti itu berlaku berulang kali ketika ibu dan ayah mangsa tiada di rumah. Perayu berpesan kepada mangsa supaya tidak beritahu kepada ibu dan ayahnya. Pengadu tidak memberitahu kepada ibu bapanya kerana takut kepada perayu.

[13] Pada 5 Ogos 2021 mangsa telah membuat satu laporan polis di Balai Polis Bangi, Selangor tentang kejadian yang berlaku ini. Laporan Polis Bangi/001724/21 ditandakan sebagai eksh P2.

[14] Bertindak atas laporan yang diterima, pada tarikh yang sama jam lebih kurang 4 petang, Inspektor Mohd Faeez bin Norzah yang merupakan pegawai penyiasat kes bersama sepasukan anggota polis dari Jabatan Siasatan Jenayah, Ibu Pejabat Polis Daerah Kajang, Selangor telah pergi ke tempat kejadian dan mendapati perayu sedang berada di dalam bilik tengah rumah tersebut. Perayu telah ditangkap dan dibawa ke Ibu Pejabat Polis Daerah Kajang untuk siasatan lanjut.

[15] Pada tarikh yang sama, jam lebih kurang 6 petang mangsa telah dibawa oleh pihak polis ke Hospital Kajang untuk pemeriksaan perubatan. Hasil pemeriksaan fizikal yang dilakukan oleh Doktor Amir Arief bin Ahmad Saifuddin pegawai perubatan mengesahkan bahawa terdapat koyakan lama pada hymen mangsa pada kedudukan jam 3 dan 9. Laporan perubatan bertarikh 5 Ogos 2021 ditandakan sebagai eksh P6:

Peruntukan Undang-Undang

(a) s 376B Kanun Keseksaan memperuntukkan seperti berikut:

> 376B Punishment for incest
>
> (1) Whoever commits incest shall be punished with imprisonment for a term of not less than ten years and not more than thirty years, and shall also be liable to whipping.

(b) s 376(3) Kanun Keseksaan memperuntukkan seperti berikut:

> 376 Punishment for rape
>
> (1) Subject to subsections (2), (3) and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be punished with whipping.
>
> (2) ... (a)–(k)
>
> (3) Whoever commits rape on a woman whose relationship to him is such that he is not permitted under the law, religion, custom or usage, to marry her, shall be punished with imprisonment for a term of not less than eight years and not more than thirty years, and shall also be punished with whipping of not less than ten strokes.

(c) s 16 Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 memperuntukkan seperti berikut:

> 16 Person in a relationship of trust
>
> (1) If a person who commits any offence under this Act or any offence specified in the Schedule against a child, is in a relationship of trust with the child, such person shall, in addition to the punishment to which he is liable for such offence, be punished with imprisonment for a term not exceeding five years and shall also be punished with

whipping of not less than two strokes.

(2) In this section, a person is said to be in a relationship of trust with a child if the child is under his care, supervision or authority, including but not limited to —

(a) a parent, guardian or person who is related through full- blood or half-blood, or through marriage or adoption, including de facto adoption;

(b) a person who looks after one or more children for valuable consideration for any period of time;

(c) a teacher, lecturer or warden of a kindergarten, school, public institution of higher learning or private institution of higher learning;

(d) any person providing healthcare services in a Government healthcare facility or private healthcare facility as defined in section 2 of the Private Healthcare Facilities and Services Act 1998 [Act 586];

(e) a coach; and

(f) a public servant of whatever rank in the course of his duty under any written law in respect of the child.

(d) s 60 Akta Mahkamah Kehakiman 1964 memperuntukkan seperti berikut:

60 Powers of Court of Appeal.

(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

(3) The Court of Appeal shall in no case make any order under this

section as to payment of costs of any appeal to or by the appellant or respondent.

(e) petisyen rayuan perayu:

(a) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan pengakuan salah yang telah dibuat oleh Perayu pada 16 Ogos 2021 tidak selaras dengan keperluan di bawah seksyen 173(b) Kanun Tatacara Jenayah;

(b) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta berkenaan pemahaman menyeluruh Perayu terhadap kandungan pertuduhan dan kesan pengakuan salah Perayu pada 16 Ogos 2021;

(c) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal menimbangkan situasi Perayu tidak dinasihafkan untuk mendapatkan khidmat nasihat peguam semasa pengakuan salah Perayu pada 16 Ogos 2021 memandangkan graviti kesalahan yang berat;

(d) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta untuk menimbangkan keperluan pemakaian prinsip keadilan asasi (natural justice) dalam keadaan Perayu tidak diwakili oleh Peguam semasa pengakuan salah dibuat;

(e) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menerima-pakai Laporan Pemeriksaan Awal (Eksibit P-6) yang telah ditandakan melalui Perayu pada 16 Ogos 2021 yang mana Perayu pada seluruh masa material tidak mempunyai kapasiti dan pengetahuan untuk memperakui keesahan dan kebenaran kandungan Eksibit P-6 tersebut;

(f) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila berpendapat mitigasi Perayu pada 16 Ogos 2021 sebagai suatu mitigasi yang jelas sedangkan mitigasi Perayu tersebut adalah bersifat ringkas dan menunjukkan bahawa Perayu tidak memahami kesan pengakuan salah Perayu tersebut;

(g) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila bersetuju dengan Hakim Mahkamah Sesyen berkenaan prinsip-prinsip faktor mitigasi yang digunapakai oleh Hakim Mahkamah Sesyen;

(h) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menambah hukuman penjara Perayu daripada 18 tahun penjara kepada 20 tahun penjara dari tarikh tangkap dan mengekalkan hukuman lain oleh Hakim Mahkamah Sesyen tanpa mengambil kira faktor usia Perayu; dan

(i) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal menimbangkan sabitan salah

terhadap Perayu adalah sabitan yang tidak selamat.

ISU-ISU UTAMA UNTUK PENENTUAN

[16] Petisyen rayuan di atas hanya terhad kepada dua isu sahaja iaitu:

(a) sabitan adalah tidak selamat dan harus diketepikan; dan

(b) hukuman pemenjaraan adalah terlalu tinggi.

KEPUTUSAN KAMI

[17] Peruntukkan terpenting di sini adalah s 305 Kanun Tatacara Jenayah yang memperuntukkan seperti berikut:

> 305 When plea of guilty limited right of appeal.
>
> When an accused person has pleaded guilty and been convicted by a Magistrate on that plea, there shall be no appeal except as to the extent or legality of the sentence.

[18] Peruntukkan s 305 Kanun Tatacara Jenayah ini jelas menyatakan bahawa seseorang tertuduh yang mengaku salah dan disabitkan di atas sesuatu pertuduhan hendaklah dihalang daripada merayu terhadap sabitan tersebut. Rayuan hanya terhad terhadap berat atau kesahan hukuman itu sahaja (*there shall be no appeal except as to the extent or legality of the sentence*).

[19] Rasional di sebalik peruntukan ini adalah seseorang yang mengetahui dan menyedari sifat serta akibat pengakuan salahnya yang dibuat tanpa syarat tidak sepatutnya merasa terkilan di atas sabitan yang direkodkan. Ini adalah kerana beliau sendiri yang memilih untuk berbuat demikian dengan sukarela tanpa apa-apa paksaan, pujukan atau janji daripada mana-mana pihak.

[20] Persoalan yang berbangkit di sini adalah, bolehkah kami di peringkat rayuan ini mempertimbangkan lagi rayuan perayu terhadap sabitan? Tidakkah pintu rayuan atas sabitan telah ditutup dengan serapat-rapatnya dan dikunci dengan dikemas sehingga tidak lagi boleh dibuka atau dirayu oleh perayu setelah perayu dengan rela hati memilih untuk mengaku salah terhadap pertuduhan tersebut

[21] Bagi merungkai persoalan ini adalah penting bagi kami untuk meneliti beberapa otoriti-otoriti duluan sebagai panduan.

[22] Di dalam kes *Public Prosecutor v Paghutheen* [1969] 1 MLJ 25, Ong Hock Sim H (beliau pada ketika itu) menyatakan seperti berikut:

> ... where an accused person has been convicted by the magistrate on his own plea of

guilty and is precluded from appealing against the legality of the sentence under s 305 of the States Code, the appellate court can always in a proper case exercise its powers of revision, I decided to revise this case. I find in the circumstances, justice is best done if I quash the conviction on these charges and order the fines to be refunded.

[23] Di dalam kes *Wong Siak Fon v Public Prosecutor* [1972] 1 MLJ 203 di ms 205, Lee Hun Hoe H (beliau pada ketika itu) menyatakan seperti berikut:

In the present case although the appellant has no right of appeal against his conviction the appellate court is entitled to look into the record and, if there is any irregularity which occasions a failure of justice, the court will exercise its powers of revision.

[24] Di dalam kes *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645, Gopal Sri Ram HMR (beliau pada ketika itu) di dalam menyampaikan penghakiman majoriti Mahkamah Rayuan menyatakan seperti berikut:

I begin by recognising that under s 305 of the Code, a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the Judge hearing the case to act in revision. Of course, the appellant in such a case ought, wherever possible, to give the court and the public prosecutor adequate notice of this, setting out the grounds on which the revision will be sought. A court hearing an appeal against sentence is entitled to and will where appropriate, act in revision and set aside a conviction. The Malayan Law Journal is replete with pronouncements that support this proposition and I need only mention the decisions in *Low Hiong Boon v Public Prosecutor* [1948–49] MLJ Supp 135 and *Tang Kee Chie v Public Prosecutor* [1987] 1 MLJ 430 as illustrations of the principle. Reference may also be usefully had to the remarks of Thomson CJ in *Ho Kin Luan v Public Prosecutor* [1959] MLJ 159; [1959] CLJU 33; [1959] 1 LNS 33, at p 161 (MLJ).

In *Tang Kee Chie*, Chong Siew Fai J (now FCJ) stated the principle in the following words:

Learned counsel for the prosecution, obviously with s 305 of the Criminal Procedure Code and/or s 50(2) of the Courts of Judicature Act, 1964 in mind, submitted that since the appellant had pleaded guilty and was convicted on such plea, there could be no appeal against conviction. I need only refer to the following cases to illustrate that convictions were set aside where the accused persons were convicted on their own plea of guilty. *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30; [1971] CLJU 38; [1971] 1 LNS 38*, Subramaniam & Anor v Public Prosecutor* [1976] 1 MLJ 76; [1975] CLJU 169; [1975] 1 LNS 169 If the facts disclosed in a case show the absence of an essential ingredient constituting the alleged offence such that no court would have convicted the accused, the conviction and sentence will be set aside. Even if there is no right of

appeal, this court as the appellate court is entitled to look into the record and exercise its power of revision if the record shows that a failure of justice had occasioned.

In *Manokaran v Public Prosecutor* [1979] 1 MLJ 262; [1978] CLJU 118; [1978] 1 LNS 118 Abdoolcader J (as he then was) dealt with the revisionary power in the following way:

> I have however not only extensive powers of revision in criminal proceedings under the provisions of s 325 of the Criminal Procedure Code but even wider powers conferred by s 35 of the Courts of Judicature Act, 1964, and the deputy public prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. I would merely add that in my view notwithstanding the provisions of s 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.
>
> It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to, counsel on both sides of the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors* to the effect that when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by another provision in the Criminal Procedure Code from doing so in the appeal.

The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged: *Dorai Manickam v R* [1936] MLJ 261; [1936] CLJU 12; [1936] 1 LNS 12.

[25] Di dalam kes *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65; [1997] 1 CLJ Supp 485, Augustine Paul PK (beliau pada ketika itu) menyatakan seperti berikut:

> the accused pleaded guilty before the magistrate' court at Jasin, Melaka on account of possessing and with intention to sell an admission permit which was found to be a forged permit an offence under s 56(1A)(b) of the Immigration Act 1959/63 ('the Act') and he was imposed a sentence of one year's imprisonment under s 57 of the Act. It was uncertain whether the accused admitted the facts as contained in the summary of the facts of the case ('exh P2'). There was no record to show that the facts were explained to the accused. It was also not shown in the record that the guilty plea of the accused was accepted by the learned magistrate. The accused appealed against the sentence.

In considering the proper order to be made, I bear in mind s 305 of the CPC which provides that a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the court hearing the appeal to act in revision. The court is entitled to and will, where appropriate, act in revision and set aside a conviction (see *Lee Yu Fah & Ors v Public Prosecutor*) and *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 (CA)). Upon revision, the proper order for the High Court to make is to set aside the plea of guilty and and substitute it with a plea of not guilty and send the case back to the trial court (see *Public Prosecutor v Mohamed Termizi*).

[26] Di dalam kes *Hajar bt Ishak v Public Prosecutor* [2000] MLJU 367; [2000] 4 CLJ 46, Zainun Ali H (beliau pada ketika itu) memutuskan seperti berikut:

Section 305 CPC provides that a person who has been convicted on his plea of guilty is entitled to appeal only against the extent or legality of his sentence. However, the court is entitled to, and will where appropriate, act in revision and set aside the conviction. In the instant appeal, upon revision, the proper order for the court to make would be to set aside the plea of guilty and substitute it with a plea of not guilty and send the case back to the trial court (*Public Prosecutor v Mohamed Termizi*).

Thus, after considering the various issues involved in this appeal, and upon considering the submissions of both the learned DPP and counsel for the appellant, this court finds that there are grounds to act in revision and accordingly quash the conviction and sentence and remit the case to be retried before another sessions court.

[27] Di dalam kes *Norshaharin v Public Prosecutor* [2001] MLJU 631; [2002] 5 CLJ 492, VT Singham PK (beliau pada ketika itu) menyatakan seperti berikut:

This court is of the view that the function of the court in respect of a statutory provision which is expressly clear is merely to interpret the provisions of the statute and not to include or import words into the statute. If s 305 of the Criminal Procedure Code expressly and clearly states that there shall be no appeal accorded to an accused person who has pleaded guilty and been convicted by a court on such plea except as to the extent or legality of the sentence, this court cannot import words into the statute to state that ... an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law as that inclusion to s 305 of the Criminal Procedure Code would with respect amount to usurping the function of the legislature. Every statutory provision or limitation in a statute must have a purpose and becomes law after a debate in parliament and passed by parliament. Unless and until such provision or limitation in the statute are strictly adhered to by litigants, the High Courts will be flooded with appeals against conviction where an accused person has pleaded guilty and the sentence has been

imposed in accordance with the law and in the exercise of a judicial discretion. This court is of the view that if the limitation of an appeal against conviction as provided under s 305 of the Criminal Procedure Code is not strictly observed and the views in *Manokaran & Anor v Public Prosecutor* [1979] 1 MLJ 262, is allowed to prevail there is no guarantee that there will be no abuse by litigants who may wish to try their luck by lodging an appeal against the conviction.

Notwithstanding that this court would prefer to follow the views in *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65; [1997] 1 CLJ Supp 485, this court wishes to make it clear that an accused person who has appealed against the sentence imposed by the lower court where he has pleaded guilty is not prevented from urging the appellate court to act in revision at the hearing of the appeal in respect of the conviction which the appellant has no statutory right of appeal if it is found that the conviction is illegal or if the charge discloses no offence in law (see *Sures a/l Perumal v Public Prosecutor* [2001] 2 MLJ 106; [2001] 2 CLJ 88 and *Veerian T Latchmanen v Public Prosecutor* [2001] MLJU 499; [2001] 7 CLJ 466). Both the two cases are the decision of this court (see *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 at 137–138).

[28] Berdasarkan kepada nas undang-undang di atas adalah jelas bahawa walaupun s 305 Kanun Tatacara Jenayah menyekat rayuan terhadap sabitan dibuat setelah pengakuan salah dirakamkan, namun kami di peringkat rayuan ini masih boleh mempertimbangkan rayuan terhadap sabitan tersebut jika kami mendapati sabitan yang direkodkan itu adalah tidak sah atau menyalahi undang-undang dan sebagainya. Di dalam situasi demikian, kami dibenarkan, jika bersesuaian, melaksanakan kuasa penyemakan yang diberikan di bawah s 323(1) Kanun Tatacara Jenayah 'for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court' untuk mengenepikan sabitan dan hukuman tersebut jika terdapat alasan yang kukuh untuk kami bertindak sedemikian.

[29] Persoalan kedua adalah sama ada hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak sebelum merekodkan pengakuan salah dan sabitan terhadap perayu dan hukuman dijatuhkan telah memastikan bahawa pengakuan salah tersebut dibuat tanpa bersyarat dan perayu mengetahui sifat dan akibat pengakuan salahnya itu. Prosedur ini mesti dipatuhi dengan ketat tanpa gagal sepertimana yang telah diperuntukkan di bawah s 173(b) Kanun Tatacara Jenayah. Dengan ini kami memutuskan untuk menyemak kembali perintah yang telah dibuat melalui kuasa yang diberikan di bawah peruntukan tersebut:

173 Procedure in summary trials.

The following procedure shall be observed by Magistrates in summary trials:

(b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court

shall pass sentence according to law: Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

[30] Bagi menentukan sama ada prosedur ini dipatuhi atau tidak, maka adalah penting bagi kami membentangkan nota prosiding (kandungan 14 rekod rayuan Jld 3 ms 1–3) tentang apa yang berlaku pada 16 Ogos 2021 di hadapan hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak, Putrajaya tersebut:

Isnin, 16 Ogos 2021

No Kandungan: 1

Jenis Prosiding: Sebutan

Pendakwa Raya: Shamsiah Maibon [Pejabat Timbalan Pendakwa Raya Negeri Selangor]

Peguam Tertuduh: OKT hadir [Mewakili Diri Sendiri]

MINIT:

SAMSUDIN BIN MD SUPPIAN [No Kad Pengenalan: 530707715199] Kesalahan: Seksyen 376B Kanun Keseksaan *dan boleh dihukum dibawah* Seksyen 376 (3) Kanun Keseksaan *dan dibaca bersama* Seksyen 16 (1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017; Pertuduhan dibaca dan diterangkan dalam Bahasa Malaysia. Tertuduh faham, tertuduh mengaku salah atas pertuduhan Tertuduh faham sifat dan akibat daripada pengakuannya dan berhasrat untuk mengaku salah, tanpa syarat.

DPP

–pohon tangguh sebentar untuk penyediaan fakta kes.

Mahkamah

–Stand down

10.40am

Pihak seperti terdahulu.

DPP — kemukakan Fakta kes — P1

(dibaca dan diakui benar oleh OKT)

Laporan Polis Bangi 001724/21 — P2

(dibaca dan diakui benar oleh OKT)

Laporan Polis Bangi 001730/21 — P3

(dibaca dan diakui benar oleh OKT)

Rajah kasar — P4

(diterangkan dan diakui benar oleh OKT)

10 keping gambar tempat kejadian — P5A-J

(diterangkan dan diakui benar oleh OKT)

Laporan pemeriksaan awal — P6

(dibaca dan diakui benar oleh OKT)

Sijil kelahiran — P7

(dibaca dan diakui benar oleh OKT)

Rayuan OKT

–Saya pohon hukuman dikurangkan. Saya bekerja sebelum ditangkap sebagai cleaner. Sekarang saya sudah lama tidak bekerja. Saya menanggung isteri dan saya duduk bersama dengan anak. Saya tiada masalah kesihatan.

DPP

–OKT berusia 68 tahun dan mangsa belum mencukupi umur 8 tahun. Perhubungan OKT dan mangsa adalah datuk kandung. Sebagai datuk kandung, OKT sepatutnya menjaga keselamatan dan memberikan kasih sayang kepada mangsa sebagai cucunya dan bukan menggelapkan masa hadapan mangsa.

–Kejadian rogol ke atas cucu sendiri ini akan memberikan impact yang kuat ke atas mangsa. Adalah diharapkan hukuman yang akan diberikan dapat memberikan keinsafan kepada OKT dan OKT bertaubat dan tidak melakukan perkara yang sama pada masa akan datang.

Mahkamah

–OKT didapati bersalah dan disabitkan di atas pertuduhan.

JAMIN:

N/A

HUKUMAN:

SAMSUDIN BIN MD SUPPIAN [No Kad Pengenalan: 530707715199] Kesalahan: Seksyen 376B Kanun Keseksaan dan boleh dihukum dibawah Seksyen 376 (3) Kanun Keseksaan *dan dibaca bersama* Seksyen 16 (1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017*;*

Didapati salah dan disabitkan atas pertuduhan. Pemenjaraan: 18 Tahun Tarikh Ditangkap. Lain-Lain Hukuman/Perintah: Perintah

1. OKT diperintahkan untuk menjalani kaunseling pemulihan selama 10 tahun di bawah seksyen 26(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017.

2. OKT diperintahkan untuk menjalani pengawasan polis selama 3 tahun setelah selesai menjalani hukuman pemenjaraan di bawah seksyen 27(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017.

Kaedah Pelupusan; Mengaku Salah (MS)

KEPUTUSAN:

Dilupuskan (Bukan Bicara Penuh) — Mengaku Salah TARIKH AKAN DATANG:

Diendoskan oleh, Puan Yong Zarida Binti Sazali

[31] Berdasarkan nota prosiding yang tercatat di dalam rekod rayuan di atas adalah jelas bahawa hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak yang bijaksana telah mematuhi kesemua kehendak peruntukan di bawah s 173(b) Kanun Tatacara Jenayah dengan sempurna sebelum beliau merekodkan sabitan dan hukuman. Bukan setakat itu sahaja, kesemua keterangan dokumentari yang dikemukakan dan ditandakan di mahkamah sebagai eksh P1–P7 juga turut dibacakan kepada perayu dan ada juga ekshibit yang diterangkan kepada perayu bagi memudahkan beliau memahaminya. Kesemua ekshibit-ekshibit ini kemudiannya diakui benar oleh perayu. Perayu juga telah mengemukakan mitigasinya sebelum mahkamah menjatuhkan hukuman.

[32] Di peringkat rayuan di Mahkamah Tinggi pula, persuruhjaya kehakiman yang bijaksana juga turut mengesahkan dan mengekalkan sabitan dengan menyatakan seperti berikut:

> [15] Setelah meneilti nota keterangan seperti di Jld 2 rekod rayuan, mahkamah mendapati tiada kesilapan tatacara dalam pengakuan salah perayu/tertuduh dan pengakuannya adalah tidak bersyarat. Perayu/tertuduh juga berupaya memberikan mitigasi dengan jelas dan nyata meminta hukuman dikurangkan. Justeru, mahkamah bersetuju dengan dapatan HMS yang bijaksana bahawa peruntukan s 305 Kanun Tatacara Jenayah adalah terpakai dalam kes ini dan menolak rayuan perayu/tertuduh. sabitan dikekalkan.

[33] Sebagai rumusan, kami mendapati tiada sebarang ketidakpatuhan atau pelanggaran prosedur yang berlaku sehingga memprejudiskan perayu atau mendatangkan apa-apa ketidakadilan undang-undang *(miscarriage of justice)* kepada beliau sepanjang prosiding ini berjalan. Sabitan adalah selamat.

[34] Beralih kepada rayuan terhadap hukuman pula, secara prinsipnya, mahkamah di peringkat rayuan jarang sekali campur tangan atau mengganggu hukuman yang dijatuhkan oleh hakim bicara melainkan terdapat alasan-alasan yang kukuh dan mendesak untuk berbuat demikian.

[35] Di dalam kes *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139, Mahkamah Persekutuan melalui penghakiman yang disampaikan oleh Raja Azlan Shah Ag LP menyatakan seperti berikut:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way.

A As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of B action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious C judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore, sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have D imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[36] Di dalam kes *Pendakwa Raya v Prabu a/l Veeramuthu and Others* [2010] MLJU 663; [2010] 8 CLJ 257; [2010] 1 LNS 695, Mahkamah Rayuan E melalui penghakiman yang disampaikan oleh Hasan Lah HMR (beliau pada ketika itu) menyatakan seperti berikut:

[11] In an appeal against sentence an appellate court would not disturb the sentence imposed unless the trial court had erred in applying the correct principles of sentencing or had embarked on some unauthorized or extraneous exercise of F discretion (see *Ganesan a/l Nachiappan & Ors v Public Prosecutor* [2000] 3 MLJ 244; [2000] 3 CLJ 302*; Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102*; Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139 *and Yit Kean Hong v Public Prosecutor* [2005] 4 CLJ 592.)

G

[37] Di dalam kes *Pendakwa Raya lwn Ramakrishnan a/l Subramaniam dan lain-lain* [2013] 2 MLJ 549; [2012] 9 CLJ 443, Mahkamah Rayuan melalui penghakiman yang disampaikan oleh Azahar Mohamed HMR (beliau H pada ketika itu) menyatakan seperti berikut:

Mengikut prinsip penghukuman yang sedia ada, setiap orang yang bersalah akan menerima hukuman yang setimpal dengan bentuk kesalahan yang dilakukan. Mahkamah hendaklah menjatuhkan hukuman menurut undang-undang untuk menentukan supaya hukuman yang dikenakan terhadap pesalah itu adil, I bersesuaian dan setimpal dengan apa-apa kesalahan yang dilakukannya itu. Adalah juga menjadi prinsip undang-undang yang mantap bahawa mahkamah yang mendengar rayuan tidak seharusnya campur tangan dengan hukuman yang dikenakan oleh hakim perbicaraan dan selalunya tidak akan menukar hukuman melainkan ianya berpuas hati bahawa hukuman yang dijatuhkan oleh hakim berkenaan itu ternyata amat tidak memadai atau mencukupi atau keterlaluan atau

tidak sah atau pun tidak merupakan hukuman yang wajar memandangkan semua fakta yang didedahkan, atau bahawa mahkamah tersebut jelas tersalah didalam memakai prinsip yang betul dalam penilaian hukuman. Prinsip undang-undang yang menentukan kawalan dan semakan keputusan berkaitan dengan hukuman telah digariskan dengan jelas dalam kes *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139 dan kes *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457.

[38] Di dalam kes *Kesavan a/l Baskaran v Public Prosecutor* [2008] 6 MLJ 384, Gopal Sri Ram HMR (beliau pada ketika itu) menyatakan seperti berikut:

[7] Generally speaking, a plea of guilt is a strong mitigating circumstance operating in favour of an accused. However, there may be cases where the offence committed is so serious and the circumstances in which it was committed so heinous that a plea of guilt need be given little or no weight. The need to protect the public is another factor that may prevail over a plea of guilt.

In this context we find it sufficient to refer to the decision of the Criminal Division of the English Court of Appeal in *R v Costen* (1989) 11 Cr App R (S) 182 *at p 184 where Lord Lane LCJ said:*

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount.

[9] Lastly, in *Fu Foo Tong v Public Prosecutor* [1995] 1 SLR 448, Karthigesu JA when delivering the judgment of the Singapore Court of Appeal expressed views with which we are entirely in agreement:

> It is not axiomatic that every plea of guilty 'entitles', as it was contended by counsel to a discount of between one-quarter to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction. As Chan Sek Keong J (as he then was) said in *Wong Kai Chuen Philip v Public Prosecutor* [1991] 1 MLJ 321 *(cited with approval by this court in Public Prosecutor v Lee Meow Sim Jenny* [1993] 3 SLR 885).
>
> ... the voluntary surrender by an offender and a plea of guilty by him in court are factors that can be taken into account in mitigation as they may be evidence of remorse and a willingness to accept punishment for his wrongdoing. However, I think that their relevance and the weight to be placed on them must depend on the circumstances of each case. I do not see any mitigation value in a robber surrendering to the police after he is surrounded and has no means of escape, or much mitigation value in a professional man turning himself in the face of absolute knowledge that the game is up.

[39] Di dalam kes *Tuan Mat bin Tuan Lonik v Public Prosecutor* [2009] 4

MLJ 81; [2009] 4 CLJ 638, Mahkamah Rayuan melalui penghakiman yang disampaikan oleh Suriyadi Halim Omar HMR (beliau pada ketika itu) memutuskan seperti berikut:

> [20] The appellant here had pleaded guilty to all the despicable offences committed during those years, when the stepdaughter was his ward. Even though a plea of guilt is a mitigating factor and some credit or discount is normally given, not all pleas of guilt may be accorded that privilege. A court has the discretion not to entertain such discounts (*Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134*; Melvani v Public Prosecutor* [1971] 1 MLJ 137*; Public Prosecutor v Sulaiman Ahmad* [1993] 1 MLJ 74; [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447*; Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45). It is widely known that incest statistically appears to be on the rise, with the victim getting younger by the day, as reported daily by the local media. And no amount of consensual defence will be accepted, be it on ground of religion, morality, or law. With the facts as they were, let alone public interest demands a retributive and deterrent sentence, discounts are not appropriate here (*Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181; [1998] 2 CLJ 370*; Public Prosecutor v Dato' Nallakaruppan Solaimalai* [1999] MLJU 74; [1999] 2 CLJ 596).
>
> [21] The appellant is the authority in the household, and every member of the family would inevitably look up to him, not only for guidance, but also protection. Unfortunately, the trust was betrayed when he took advantage of his power of strength by regularly forcing himself on the victim. In *Datuk Haji Harun bin Hj Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 the status of the prisoner was taken into account when the former Menteri Besar of Selangor, who had been convicted of the offences of forgery and conspiracy to commit criminal breach of trust, was treated to a more severe sentence. When imposing a higher sentence against the former Menteri Besar as compared to the co-accused, Wan Suleiman FJ had stated:
>
> > We are of the opinion that he was the principal actor in this drama. But for him and his support for the big fight, these crimes might not have been committed and his co-accused who look up to him and were loyal to him might not have got into trouble ... in view of ... the need for people in public life to show a good example to those below them and of the serious breach of trust placed in him by the members of the bank who were poor people from rural areas who have a right to expect their leaders not to touch a penny of money entrusted to his care, we are of the opinion that this appellant should serve a longer period in prison than the second ...
>
> [23] Here, where there is a need for each and every rape to be punished, let alone if the sentence of the second charge were not ordered to run consecutively with the first charge, the appellant in no time would be back on the street, not only free to terrorise his family members but also exact revenge on the wife who lodged the police report against him.
>
> [24] An appellate court will not be overly ready to interfere with any sentence imposed by the trial court unless there are very good reasons to do so.

[40] Kes-kes yang melibatkan jenayah seksual adalah suatu kesalahan yang keji dan mengaibkan lebih-lebih lagi di dalam kes ini di mana mangsa telah dirogol oleh datuknya sendiri. Lebih memalukan perayu ketika itu berusia 68 tahun tergamak merogol cucunya sendiri, seorang murid sekolah darjah satu yang pada ketika itu baru sahaja berusia tujuh tahun tujuh bulan. Perayu yang diamanahkan untuk menjaga cucunya telah mengambil kesempatan memuaskan nafsunya semasa ibubapa mangsa tiada di rumah. Amanah yang diletakkan di atas bahu perayu oleh kedua-dua ibubapa mangsa untuk menjaga mangsa telah dikhianati oleh perayu.

[41] Justeru itu, hukuman berat wajar dikenakan terhadap perayu sebagai pengajaran kepada beliau dan amaran kepada masyarakat umum supaya jangan sesekali terlibat di dalam jenayah sebegini di masa-masa hadapan.

[42] Di dalam kes *Ong Lai Kim v Public Prosecutor and other appeals* [1991] 3 MLJ 111, Zakaria Yatim H (beliau pada ketika itu) mengatakan seperti berikut:

> The offence of rape is rampant in this country. The court will be failing in his duty if it does not impose a deterrent sentence in this case. The punishment must not only deter others from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offence including the crime of rape should adequately reflect the revulsion felt by the great majority of society.

[43] Di dalam kes *Public Prosecutor v William Ayau* [2005] 4 MLJ 328 Sulong Matjeraie H (beliau pada ketika itu) mengatakan seperti berikut:

> There should be a 'turning of tide' in favour of appropriate sentence for rape cases to reflect the abhorrence of society against rapist. This court takes judicial notice of the frequent reports in the national and local newspaper of incidents of rape. Sometimes these can be brutal and have understandably triggered an outpouring of rage with mounting public pressure to come down hard on rapist. Let the message be heard, loud and clear, that in this court there is zero tolerance of rape. No one who has committed an offence of rape can expect, upon conviction, to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be sentenced or punished with the maximum allowed by the law. The maximum sentence for this offence is not more than 20 years and shall also be liable to whipping.
>
> It is incumbent upon a judge to impose a just and appropriate sentence in rape cases to inspire the public confidence in the rule of law. The judge's duty to uphold the rule of law is of particular importance when the judge Is dealing with the laws which protect the community from crime, such as rape cases. In this context the judge's preliminary responsibility is the protection of the public. e community must be protected from crime, and, where the exercise of this responsibility arises, the judge should have public protection at the forefront of his mind.

A **[44]** Tidak dapat dinafikan bahawa perayu telah membuat pengakuan salah dan ini telah menjimatkan masa dan kos kesemua pihak yang terlibat termasuk saksi-saksi pendakwaan yang juga tidak perlu dipanggil untuk memberi keterangan. Namun begitu, kepentingan individu tidak harus mengatasi kepentingan awam.

B

KESIMPULAN

[45] Kami sebulat suara menolak rayuan perayu terhadap sabitan dan hukuman. Lain-lain perintah tambahan yang diberikan oleh Mahkamah **C** Tinggi juga turut dikekalkan.

Rayuan perayu terhadap sabitan dan hukuman ditolak; lain-lain perintah tambahan yang diberikan oleh Mahkamah Tinggi dikekalkan.

D Dilaporkan oleh Dzulqarnain Ab Fatar

E

F

G

H

I